

No. 81720-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of:

Colton Singleton, d.o.b. 10/05/1999

ON REVIEW FROM THE COURT OF APPEALS, DIVISION THREE

SUPPLEMENTAL BRIEF OF PETITIONER AMY SAMPEY

LILA J. SILVERSTEIN
Attorney for Petitioner Amy Sampey

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 APR 20 P 3:36

BY RONALD R. CARPENTER

CLERK

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

A. INTRODUCTION	1
B. STATEMENT OF THE CASE	3
C. TIMELINE	12
D. ARGUMENT	14
1. A parent has a fundamental right to custody of her children, and this right may not be terminated unless the State proves that the parent is presently unfit	14
2. The trial court properly found that Amy Sampey cured the drug problem that prompted intervention, but it violated RCW 13.34.180(1)(e) and Ms. Sampey's right to due process by terminating her relationship with Colton on the basis that she had not proven she could handle a child with ADHD	16
a. The mother cured the deficiencies that prompted intervention.	16
b. The newly identified deficiency – the child's ADHD – is not a parental deficiency at all.	19
c. Even if inexperience with ADHD is a parental deficiency, the State impermissibly failed to provide notice of this concern.	21
d. Even if inexperience with ADHD is a parental deficiency, the trial court impermissibly shifted the burden of proof to the mother to show that she could raise a child with ADHD..	25
e. Regardless of who bears the burden, there is insufficient evidence to support termination under subsection (e)	27
3. Assuming a parent's inexperience with ADHD constitutes a deficiency, the State's utter failure to provide Amy Sampey with any of the myriad services it provided the foster mother to help her handle a child with ADHD requires reversal under RCW 13.34.180(1)(d)	28

E. CONCLUSION	30
---------------------	----

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Custody of Smith</u> , 137 Wn.2d 1, 16-19, 969 P.2d 21 (1998), <u>aff'd sub. nom. Troxel v. Granville</u> , 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).....	14
<u>In re Dependency of Hall</u> , 99 Wn.2d 842, 664 P.2d 1245 (1983)	28
<u>In re Dependency of Key</u> , 119 Wn.2d 600, 836 P.2d 200 (1992), <u>cert. denied</u> 507 U.S. 927 (1993).....	19
<u>In re Dependency of Schermer</u> , 161 Wn.2d 927, 169 P.3d 452 (2007)....	19
<u>In re Hudson</u> , 13 Wn.2d 673, 126 P.2d 765 (1942).....	14
<u>In re Petrie</u> , 40 Wn.2d 809, 246 P.2d 465 (1952).....	21
<u>In re Welfare of Luscier</u> , 84 Wn.2d 135, 524 P.2d 906 (1974)	21
<u>In re Welfare of Sego</u> , 82 Wn.2d 736, 513 P.2d 831 (1973)	14

Washington Court of Appeals Decisions

<u>Halsted v. Sallee</u> , 31 Wn. App. 193, 639 P.2d 877 (1982).....	21
<u>In re Dependency of H.W.</u> , 92 Wn. App. 420, 961 P.2d 963 (1998).....	29
<u>In re Dependency of T.L.G.</u> , 126 Wn. App. 181, 108 P.3d 156 (2005)..	16, 23, 29
<u>In re H.S.</u> , 94 Wn. App. 511, 973 P.2d 474 (1999)	15, 22
<u>In re J.D.</u> , 42 Wn. App. 345, 711 P.2d 368 (1985)	14
<u>In re Sneddon</u> , 47 Wn. App. 734, 737 P.2d 280, <u>rev. denied sub nom Krause v. Catholic Cmty Servs</u> , 108 Wn.2d 1035 (1987)	15
<u>In re Welfare of C.B.</u> , 134 Wn. App. 942, 143 P.3d 846 (2006)..	16, 25, 26
<u>In re Welfare of J.M.</u> , 130 Wn. App. 912, 125 P.3d 245 (2005)	21

<u>In re Welfare of Kevin L.</u> , 45 Wn. App. 489, 726 P.2d 479 (1986)	23
<u>In re Welfare of M.R.H.</u> , 145 Wn. App. 10, 188 P.3d 510 (2008)	16
<u>In re Welfare of Martin</u> , 3 Wn. App. 405, 476 P.2d 134 (1970)	21

United States Supreme Court Decisions

<u>Lassiter v. Dep't of Soc. Servs.</u> , 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)	21
<u>Meyer v. Nebraska</u> , 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) .	14
<u>Santosky v. Kramer</u> , 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)	15, 25

Constitutional Provisions

U.S. Const. amend. XIV	14, 15
------------------------------	--------

Statutes

RCW 13.34.020	14
RCW 13.34.110	17
RCW 13.34.136	15, 22, 28, 29
RCW 13.34.138	17, 22, 29
RCW 13.34.145	29
RCW 13.34.180	passim
RCW 13.34.190	15

A. INTRODUCTION

After several false starts, Amy Sampey cured the drug and alcohol problem that prompted the State to remove her first son, Colton Singleton, from her care in 2002, and her second son, Dakota Auxier, in 2003. It is undisputed that she has been clean and sober since November 2, 2004. She did such a good job that the State returned Dakota to her and dismissed his dependency in the fall of 2005.

But the State refused to return Colton, whose foster mother opposed reunification and wanted to adopt him. The State's social worker noted that Colton had behavior problems, and she did not think Ms. Sampey could handle him without "some outside help."

The foster mother herself could not handle Colton without a lot of outside help. Colton was diagnosed with ADHD in the fall of 2005, and was kicked out of both daycare centers in their hometown of Republic. The State provided the foster mother with in-home caretakers for Colton, as well as medication, therapy, and one-on-one expert instruction on handling children with ADHD. The State provided no services to Amy Sampey related to raising a child with ADHD.

The State petitioned for termination of Ms. Sampey's relationship with Colton. The petition described the past drug abuse problem, but alleged no other deficiencies. At the termination trial, which occurred

nearly two years after Ms. Sampey had achieved sobriety, the State acknowledged that Ms. Sampey had remedied the deficiencies that prompted intervention. But it argued that her rights should be terminated anyway, based on a new “deficiency” – inexperience with ADHD. The State had provided Ms. Sampey with no notice of this alleged deficiency, and no services to address it.

The trial court found that Ms. Sampey remedied the problems that prompted intervention, but adopted the State’s argument and terminated her rights anyway on the basis that *she* had not proven she could handle a child with ADHD.

Ms. Sampey asks this Court to hold that under the Due Process Clause and the dependency statute: (1) inexperience with a disability like ADHD does not constitute a parental deficiency; (2) the State must provide notice of the specific deficiency a parent is to address prior to termination, and may not play bait-and-switch by terminating a parent’s rights on a new basis after the parent heroically remedies the deficiencies alleged; (3) the juvenile court may not shift the burden to the parent to prove she does not have a deficiency that was not alleged in the disposition order and for which no services were provided; and (4) a parent’s rights may not be terminated unless the State provided services to address the deficiency on which which termination was based.

B. STATEMENT OF THE CASE

Amy Sampey endured a difficult childhood marked by sexual assault, prostitution, and drug addiction. RP 225; CP 41. She began drinking alcohol at age 10, smoking marijuana at age 12, and injecting heroin at age 19. RP 315; CP 40. She married young, and gave birth to her first son, Colton Singleton, on October 5, 1999. RP 12.

Ms. Sampey and Colton's father separated shortly thereafter. The father is incarcerated in another state, and his parental rights have been terminated. RP 2. Ms. Sampey met Bob Auxier in 2002, and they have been together ever since. RP 200.

In May of 2002, DSHS received a referral alleging that Ms. Sampey was using drugs and neglecting Colton. Ex. 1 at 2. The court found Colton dependent and entered a disposition order in November of 2002. RP 12-13. The problems identified were drug abuse, domestic violence, and possible mental health issues. RP 10.

Ms. Sampey tried at many treatment programs over the next two years, but relapsed. RP 17-20. She ultimately succeeded in achieving sobriety, and has been clean and sober since November 2, 2004 – almost two years before the termination trial at issue in this case. RP 55, 66, 270; CP 41 (Finding of Fact G). In fact, the State's primary witness, social worker Edith Vance, testified:

Amy has been doing extremely well. Amy has looked better than people in this community have seen in years. She has shocked people in this community by how well she's been doing.

RP 62.

Ms. Sampey stayed clean and sober through the death of her sister, the death of her good friend, the death of her grandfather, her partner's drug relapses, and her own chemotherapy (during which she rejected pain medication). RP 319-323; CP 41. Her chemical dependency counselor testified she has "no concerns" that Ms. Sampey will relapse. RP 279. There has been no reported domestic violence since Ms. Sampey achieved sobriety, and the trial court found that she also addressed her minor mental health problems. RP 191, 266; CP 47.

While Ms. Sampey was working on her drug problem, Colton moved out of his grandmother's home and into the home of Arlette Porter, a foster parent. RP 15. Colton and Ms. Sampey continued to have regular visitation, and Colton stayed with his mother for up to two weeks at a time. RP 41-42. The visits went well, and shortly before the termination trial Colton told his mother that he wanted to live with her and Mr. Auxier. RP 21, 71, 76, 183; CP 45.

Ms. Sampey gave birth to her second son, Dakota Auxier, in the fall of 2003. RP 39. Because Ms. Sampey had not yet recovered from her drug addiction at that time, the Department removed Dakota and he was

found dependent in the spring of 2004. RP 47-49. But in October of 2005, after Ms. Sampey had been clean and sober for a year, Dakota was returned to her custody. RP 55-56. Dakota's dependency was dismissed, and he has been in his parents' home ever since.

Ms. Sampey is a full-time parent, while Mr. Auxier supports the family financially. RP 248. According to family counselor Ken Hickey, Ms. Sampey and Mr. Auxier are the "poster children" for healthy families, and they are raising their child in a stable environment. RP 236, 247-49. All parties agree that Ms. Sampey is a great parent to Dakota. RP 43, 90, 148, 204, 340.

But when the State returned Dakota to his parents, it left Colton in foster care. Part of the reason was that the foster mother "was very opposed to the case plan of reunification with Colton." RP 58. The department also opined that Ms. Sampey would not be able to handle both children, because in their view she was not good at multitasking. RP 57. Ms. Sampey did have difficulty handling both children before she achieved sobriety, when Dakota was a baby and Colton a preschooler. RP 56-57. But the clinical director for Ferry County Counseling Services testified that Ms. Sampey no longer has any trouble multitasking. RP 258. When Ms. Sampey's sister died, she cared for her sister's children in addition to her own for an extended period. RP 62. Ms. Sampey also

babysits her friends' children, and does well handling multiple children at once. RP 128, 142, 148, 325.

The foster mother, Ms. Porter, works full-time, so she put Colton in daycare during the day. RP 114. In the fall of 2005, Colton was diagnosed with ADHD. RP 97. He was expelled from both of the daycare centers in Republic after he attacked his caregivers. RP 54, 74, 160, 172. According to the DSHS social worker, the foster mother "was getting to the point where she couldn't handle his behaviors anymore." RP 84.

The State then provided in-home caregivers to help the foster mother. RP 64, 74-76, 160. These babysitters also had trouble with Colton; several quit, and the caregiver who was responsible for Colton at the time of the termination trial had tendered her resignation. RP 64, 74, 340. The State's social worker explained that they had to hire several different child-care providers to help the foster parent with Colton "because he's just all over the place." RP 90.

In addition to providing in-home babysitters for the foster mother, the State provided an instructor who taught her how to care for a child with ADHD. The instructor, therapist Kenneth Ray, testified at the termination trial that "when I first began working with Colton, I felt his prognosis would be very good if we were to get wraparound services to work with the parent or foster parent." RP 98. He trained the foster

mother and treated Colton with both medication and therapy. The prosecutor asked, "Now, you say you've worked with the parents and the foster parents?" The therapist responded, "The foster parents is what I mean." RP 98.

Although the State provided training, in-home helpers, and wraparound services to the foster parent to help her handle Colton's ADHD, it provided *no* services to Amy Sampey related to raising an ADHD child. RP 100. To the contrary, the department chose not to return Colton to his mother when they returned Dakota because "[t]here was a question about whether or not she would be able to constantly meet the needs of her children, of both of her children, without some outside help." RP 57.

Despite Colton's ADHD and Ms. Sampey's lack of training specific to that condition, Ms. Sampey's visits with Colton continued to go well. RP 71; CP 45. When Colton acted out, Ms. Sampey naturally employed the same tactics that the foster mother had learned in training. For example, Ms. Sampey used a quiet, soothing voice, and always gave Colton sufficient warning before it was time to go somewhere. RP 100, 290, 293, 327-28. The visitation supervisor observed that Ms. Sampey and Mr. Auxier are "incredibly patient people, and very, very loving people." RP 290.

According to Colton's therapist, he and Colton no longer have appointments with each other because Colton's medications are working and he is doing well. RP 102. The foster mother agrees that the medication "has helped tremendously." RP 165.

Despite the fact that Amy Sampey cured the deficiencies that prompted intervention, and despite the fact that she was successfully raising her other child in her home, the State petitioned for termination of her parental relationship with Colton. CP 1-5. The department's social worker was upset that Ms. Sampey had refused to sign third-party custody papers that the foster mother and the department had drawn up (giving custody to Ms. Porter), and had instead decided to fight for Colton. RP 57-62. Accordingly, the State petitioned for termination even though their own reports stated, "At present there is little risk to Colton should he be returned home." RP 78.

Although Ms. Sampey had been clean and sober for over a year at the time the termination petition was filed, the only parental deficiency alleged in the petition was drug abuse. CP 2-3.

The termination trial took place July 18-21, 2006, nearly two years after Ms. Sampey had achieved sobriety. The State called only four witnesses to testify: two DSHS social workers, the foster mother, and the therapist who trained the foster mother to work with children with ADHD.

RP 1-120. In contrast to most termination cases, all of the service providers in this case testified not on behalf of the State but on behalf of the biological mother. Three chemical dependency counselors, two Alcoholics Anonymous members, one social work counselor, one family counselor, one psychologist, and one visitation supervisor all spoke in favor of reunification and against termination. RP 176-193, 214-310. Several family members and friends also attested to Ms. Sampey's parental skills. RP 123-156, 194-213.

During closing argument, the prosecutor stated:

The court has heard ad nauseum – at great length – as to the great strides the mother has made in the past 16 months [sic] of keeping herself clean, keeping herself sober, of the strides that she has made with her significant other to create a home and the State's not denying that, Your Honor. The State's very proud of her that this is a success story, but we're not here for the success of Amy Singleton Sampey. We're here for the best interest of the child and that's what it comes down to here.

RP 347. He continued:

Now the question that is before the Court is what is necessary to parent Colton, a child with ADHD. Now, two years ago, we didn't know that Colton had ADHD.

RP 347.

The prosecutor went on to praise the foster mother, and reminded the court about the therapist the State had hired to train the foster mother to work with Colton's ADHD. RP 347. As for Ms. Sampey, the

prosecutor argued, “We haven’t heard one lick of testimony about what she’s done to acquaint herself with the proper treatment of a child with ADHD.” RP 351. The prosecutor did not present an excuse for the State’s failure to provide Ms. Sampey with the same training and services it had provided the foster mother on ADHD. Instead, he argued that the State had satisfied its burden under RCW 13.34.180 (1)(d) because it had provided services for the drug abuse problem that prompted intervention (and that Ms. Sampey had fixed). RP 346.

The prosecutor acknowledged, “I’m not saying that Amy Sampey cannot parent a child. She can parent a healthy child.” RP 360. But the prosecutor believed Ms. Sampey had to prove that she could parent a child with ADHD, and she had not done that. RP 390. Consistent with the social worker’s testimony, the prosecutor also conceded, “There may be little risk to Colton if he is returned home.” RP 358. But he urged termination anyway because, in his estimation, “there is no risk if he stays with his foster mom.” RP 358.

The trial court concluded that Ms. Sampey’s failure to substantially cure her parental deficiencies within one year of the entry of the disposition order gave rise to a rebuttable presumption that there was little likelihood that conditions could be remedied within the near future. CP 46 (citing RCW 13.34.180(1)(e)). The court then concluded that Ms. Sampey

had rebutted the presumption of unfitness with respect to drug abuse and *had* rebutted the presumption of unfitness with respect to mental health. CP 47.

But the trial court concluded that a presumption of parental unfitness had also arisen with respect to raising a child with ADHD, even though Colton was not diagnosed with ADHD until three years after the entry of the disposition order, even though the State had provided no notice to Ms. Sampey that inexperience with ADHD was a deficiency she needed to cure, and even though the State did not provide Ms. Sampey with any of the myriad services it provided the foster mother for dealing with Colton's ADHD. The court concluded that Ms. Sampey had not met her burden to show she could raise a child with ADHD. CP 47.

The court also concluded that the State had provided all services required under RCW 13.34.180(1)(d). CP 46. Consistent with the prosecutor's closing argument, the court reached this conclusion on the basis that the State had provided treatment for drug abuse, even though the State had admittedly failed to provide services for the "deficiency" on which the court was basing termination. RP 346, 363.

Ms. Sampey appealed and a commissioner passed the case to a panel of judges. The commissioner ruled:

[T]he question of whether the State has met its burden under RCW 13.34.180(e) of proving by clear, cogent and convincing evidence that there is little likelihood that conditions will be remedied so that the child can be returned to the home in the near future – specifically, whether the appellant is capable of learning how to handle C.S.’s ADHD, which was diagnosed after C.S. was found dependent and, therefore, was not the subject of services offered the appellant during the dependency – is of sufficient merit to make this case inappropriate for disposition on the motion docket.

Commissioner’s Ruling (attached as Appendix A).

A panel of the Court of Appeals affirmed the termination order, implicitly holding that Ms. Sampey bore the burden of proving that she was fit to raise a child with ADHD. Slip Op. at 15-16. The court ruled that Ms. Sampey did not meet this burden because the person the State hired to train the foster mother to work with Colton testified that it was in Colton’s best interest to stay with the foster mother, and not to go back to Ms. Sampey, whom the trainer had barely met. Slip Op. at 16.

The Court of Appeals did not address the fact that the State had failed to provide any services to Ms. Sampey related to Colton’s ADHD, instead ruling that the State had met its burden under RCW 13.34.180(1)(d) by providing services to address the drug and alcohol problems and a psychological assessment. Slip Op. at 12-13.

C. TIMELINE

For the Court’s convenience, the following one-page timeline summarizes the facts of this case in a more graphic format:

Date	Facts relating to Colton and his mother, Amy Sampey	Facts relating to Colton and his non-parental placements
October 1999	Amy Sampey gives birth to Colton Singleton.	
November 2002	Colton found dependent. Drug abuse is primary parental deficiency to be remedied. Secondary problems identified are domestic violence and possible mental health issues.	Disposition order places Colton with maternal grandmother.
January 31, 2003	Ms. Sampey engages in drug treatment and relapses.	Colton placed with foster parent, Arlette Porter.
Fall 2003		
Spring 2004		
	Ms. Sampey gives birth to Dakota Auxier.	
	Dakota found dependent.	
November 2, 2004	Amy Sampey succeeds in curing identified deficiencies. Clean and sober from this point forward. No DV from this point forward. No mental health problems from this point forward.	
Fall 2005	State returns Dakota to Ms. Sampey and Mr. Auxier and dismisses that dependency, but leaves Colton with the foster mother for fear that Ms. Sampey couldn't handle him without outside help.	Colton kicked out of two daycares and diagnosed with ADHD. Foster mother "was getting to the point where she couldn't handle his behaviors anymore."
Fall 2005 to Summer 2006	Ms. Sampey and Colton continue to have visits that go well. State provides no services to Ms. Sampey related to Colton's ADHD.	State provides foster mother with wraparound services, a series of in-home daycare providers, a therapist who teaches her how to handle a child with ADHD, as well as medication and therapy for Colton.
July 2006	Court terminates Amy Sampey's parental relationship with Colton because although she cured the problems that prompted intervention, had good visits with Colton, and was successfully raising another child, court finds she did not prove she could handle a child with ADHD.	

D. ARGUMENT

1. **A parent has a fundamental right to custody of her children, and this right may not be terminated unless the State proves that the parent is presently unfit.**

The right to parent one's children is a fundamental liberty interest protected by the Due Process Clause. Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); U.S. Const. amend. XIV. Washington courts have described this right as "sacred," In re Hudson, 13 Wn.2d 673, 685, 126 P.2d 765 (1942), and "more precious to many people than the right to life itself." In re J.D., 42 Wn. App. 345, 347, 711 P.2d 368 (1985) (quoting In re Gibson, 4 Wn. App. 372, 379, 483 P.2d 131 (1971)).

Thus, termination of parental rights is allowed "only for the most powerful of reasons." In re Welfare of Sego, 82 Wn.2d 736, 738, 513 P.2d 831 (1973). The State may interfere in the parent-child relationship only as necessary to protect the child from harm. Custody of Smith, 137 Wn.2d 1, 16-19, 969 P.2d 21 (1998), aff'd sub. nom. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). "The family unit should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized." RCW 13.34.020.

When a juvenile court orders the termination of a parent-child relationship, "[t]he termination decision must be predicated upon present

parental unfitness.” In re Sneddon, 47 Wn. App. 734, 742, 737 P.2d 280, rev. denied sub nom Krause v. Catholic Cmty Servs, 108 Wn.2d 1035 (1987). Due Process requires the State to prove present parental unfitness by clear, cogent and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 760 n.10, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); U.S. Const. amend. XIV. In other words, “the ultimate fact in issue must be shown by evidence to be ‘highly probable.’” Sego, 82 Wn.2d at 739.

By statute in Washington, the State must prove six factors by clear, cogent and convincing evidence. RCW 13.34.180(1)(a)-(f); RCW 13.34.190; In re H.S., 94 Wn. App. 511, 523, 973 P.2d 474 (1999). The factors at issue in this case are:

- (d) That services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided;
- (e) That there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided...; and
- (f) That continuation of the parent and child relationship clearly

diminishes the child's prospects for early integration into a stable permanent home.

RCW 13.34.180(1).

Even if the State proves these six factors, a court may not terminate the relationship between a parent and her child unless the State has also proved, by a preponderance of the evidence, that termination is in the child's best interest. RCW 13.34.190(2); In re Welfare of C.B., 134 Wn. App. 942, 952, 143 P.3d 846 (2006).

2. **The trial court properly found that Amy Sampey cured the drug problem that prompted intervention, but it violated RCW 13.34.180(1)(e) and Ms. Sampey's right to due process by terminating her relationship with Colton on the basis that she had not proven she could handle a child with ADHD.**

- a. The mother cured the deficiencies that prompted intervention.

A court may not terminate a parent-child relationship unless the State proves, by clear, cogent, and convincing evidence, that "there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future." RCW 13.34.180(1)(e). "Conditions" means the problems that prompted the State's initial intervention. See In re Dependency of T.L.G., 126 Wn. App. 181, 203, 108 P.3d 156 (2005) (primary purpose of a dependency is "to alleviate the problems that prompted the State's initial intervention"); In re Welfare of M.R.H., 145 Wn. App. 10, 27, 188 P.3d 510 (2008) (focus of factor (e) "is

whether the identified deficiencies have been corrected”); RCW 13.34.110(3)(c)(ii) (prior to entry of agreed dependency order, court must warn parent that termination could occur if parent “fails to substantially remedy *the problems that necessitated the child's placement in out-of-home care*”); RCW 13.34.138(2)(a) (“The parents ... shall report to the court the efforts they have made to correct *the conditions which led to removal*”).

Amy Sampey dramatically remedied the problems that prompted the State’s intervention. The primary reason that DSHS removed Colton from his home was Ms. Sampey’s drug abuse. RP 10, 13, 35. Secondly, there were concerns about domestic violence and mental health. RP 10. Ms. Sampey cured these deficiencies. There has been no domestic violence since the summer of 2004, and Ms. Sampey’s psychologist, the director of Ferry County Counseling Services, testified that Ms. Sampey no longer suffers from bipolar disorder. RP 266; CP 43. Indeed, the psychologist testified that the entire neurodiagnostic assessment report entered as Exhibit 3, which was written before Ms. Sampey achieved sobriety, does not accurately describe Ms. Sampey now. RP 256-60. Consistent with this testimony, the trial court concluded that Ms. Sampey had rebutted the presumption of unfitness with respect to mental health. CP 47.

The trial court also concluded that Ms. Sampey rebutted the presumption of unfitness with respect to the primary problem that caused DSHS to intervene: drug and alcohol abuse. CP 47 (Conclusion of Law E(1)). It found:

Amy Sampey succeeded in her 28-day stay at Sundown Ranch, graduating on November 24, 2004. She has provided UA's since her release from Sundown – two samples per week – and they have been negative. She has been sober since November 2, 2004.

CP 41 (Finding of Fact G). The court also lauded Ms. Sampey for “remain[ing] free of chemicals” while “beset by a number of personal tragedies,” like the deaths of close friends and family members and her own chemotherapy. CP 41 (Finding of Fact H).

Ms. Sampey did such a good job at fixing her drug problem that she “has shocked people in [the Ferry County] community by how well she’s been doing.” RP 62. Her chemical dependency counselor has “no concerns” that Ms. Sampey will relapse. RP 279. The Department was so impressed by Ms. Sampey’s recovery that it returned her son Dakota to her and dismissed his dependency. RP 55-56.

The same should occur with Colton, because Ms. Sampey cured the deficiencies that prompted the State to remove him from her care. The State failed to prove there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future,

as required under RCW 13.34.180(1)(e). This Court should accordingly reverse the order terminating Ms. Sampey's parental relationship with Colton.

b. The newly identified deficiency – the child's ADHD – is not a parental deficiency at all. The Ferry County prosecutor recognized that Ms. Sampey cured the problems that prompted intervention, but argued that a new deficiency – unfamiliarity with how to raise a child with ADHD – required termination of Ms. Sampey's relationship with Colton. RP 347. The court accepted the State's argument, and ordered termination on this basis. CP 47. But a child's special needs do not constitute a parental deficiency, and the court erred in so concluding.

This Court's decisions in cases involving children with serious disabilities are instructive. See In re Dependency of Schermer, 161 Wn.2d 927, 169 P.3d 452 (2007); In re Dependency of Key, 119 Wn.2d 600, 836 P.2d 200 (1992), cert. denied 507 U.S. 927 (1993). The Schermer and Key opinions explained that although the children in those cases required institutional care and the parents could not handle them in their homes, the parents were not unfit. Schermer, 161 Wn.2d at 943; Key, 119 Wn.2d at 608-09. Dependencies were appropriate, but the parents' rights could not have been terminated simply because they required outside help to deal

with their children's special needs. Schermer, 161 Wn.2d at 944; Key, 119 Wn.2d at 609.

The same is true for parents of children with less severe disabilities. Medical professionals recognize that it is difficult for parents to handle children with ADHD, and they encourage them to use outside help in the form of parenting instruction specific to ADHD, support groups, therapy for both child and parents, and medication for the child.¹ Accordingly, a parent that relies on these resources in order to raise an ADHD child cannot be deemed unfit, and the Department's refusal to return Colton to Ms. Sampey because it thought she would need "some outside help" to deal with his ADHD is patently unfair. RP 57. This is especially so given the fact that the foster mother was incapable of caring for Colton without a series of in-home helpers, instruction from an ADHD specialist, and therapy and medication for Colton – all services the State provided the foster mother, but not Ms. Sampey.

Approximately nine percent of children in the United States have ADHD.² If all of their parents were deemed unfit and their rights

¹ See <http://www.nimh.nih.gov/health/publications/attention-deficit-hyperactivity-disorder/complete-index.shtml> (last viewed 4/10/09); <http://familydoctor.org/online/famdocen/home/children/parents/behavior/118.html> (last viewed 4/10/09); <http://www.mayoclinic.com/health/adhd/DS00275/DSECTION=coping-and-support> (last viewed 4/10/09).

² <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/03/AR2007090300729.html> (last viewed 4/10/09).

terminated because of their unfamiliarity with the disorder and their resort to outside help, millions of families would be destroyed. Ms. Sampey's lack of training on ADHD does not render her an unfit parent, and the trial court erred in terminating her rights on this basis.

c. Even if inexperience with ADHD is a parental deficiency, the State impermissibly failed to provide notice of this concern. Because termination of parental rights is one of the severest of state actions, the government must "ensure that judicial proceedings are fundamentally fair." In re Welfare of J.M., 130 Wn. App. 912, 921, 125 P.3d 245 (2005) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33-34, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)). "There can be no doubt that the full panoply of due process safeguards applies to deprivation hearings." In re Welfare of Luscier, 84 Wn.2d 135, 136-37, 524 P.2d 906 (1974). This includes notice, an opportunity to be heard, the assistance of counsel, and a reasonable time to prepare for trial. In re Petrie, 40 Wn.2d 809, 812, 246 P.2d 465 (1952).

As to notice, "constitutional due process and fair treatment require that parents receive notice *of the specific issues to be considered.*" Halsted v. Sallee, 31 Wn. App. 193, 195, 639 P.2d 877 (1982); In re Welfare of Martin, 3 Wn. App. 405, 410, 476 P.2d 134 (1970) (emphasis added). "The parents must be clearly advised in adequate time to meet

that serious issue to prevent surprise, helplessness and disadvantage.”

Halsted, 31 Wn. App. at 195; Martin, 3 Wn. App. at 410. “A proceeding begun on one ground and continued on another, without any opportunity to define and contest the new allegations, constitutes a fundamental deprivation of due process.” H.S., 94 Wn. App. at 522.

Consistent with due process, the statute requires the State to notify the parent of the deficiencies she must correct in order to resume custody and avoid termination. For example, the section governing permanency planning provides, in relevant part:

The agency plan shall specify what services the parents will be offered to enable them to resume custody, what requirements the parents must meet to resume custody, and a time limit for each service plan and parental requirement.

RCW 13.34.136(2)(b)(i). The statute requires the State and the juvenile court not only to identify deficiencies initially observed, but also to notify the parents if new deficiencies are alleged and requirements change. The portion of the statute governing review hearings provides, in relevant part:

If the child is not returned home, the court shall establish in writing ... whether the services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances.

RCW 13.34.138(2)(c)(iv).

Washington courts have reversed termination orders where the State failed to provide parents with proper notice. For example, the Court of Appeals reversed a termination order where the mother did not receive notice of the Department's expectations in In re Welfare of Kevin L., 45 Wn. App. 489, 726 P.2d 479 (1986). There, the mother agreed to a dependency for one of her children because he exhibited delayed and aggressive behavior. Id. at 490-91. The mother did not appear at dependency review hearings and did not receive the special training the foster parents received to deal with Kevin's special needs. Id. at 491, 493. The trial court ultimately terminated the mother's rights, but the Court of Appeals reversed because the mother was not advised that her presence at review hearings was recommended and was not notified that her lack of participation could contribute to the termination of her parental rights. Id. at 493.

Similarly, in T.L.G., the Court of Appeals reversed a termination order because "DSHS never identified the parental deficiencies to be corrected." T.L.G., 126 Wn. App. at 198. The issues originally listed in the dependency petition (child's medical issues, lack of stable housing) were resolved long before the termination hearing. Id. at 198-99. Although mental health was also a concern, "DSHS never specified what aspect of parenting was affected." Id. at 199. Accordingly, the appellate

court held that the juvenile court erred in basing its order of termination on the parents' mental illness. Id. at 203.

Here, Ms. Sampey cured the deficiencies the department identified, and the State failed to notify her that it planned to argue for termination based on a new alleged deficiency (unfamiliarity with ADHD). The State's game of bait-and-switch violates both due process and the statute.

The only parental deficiency alleged in the petition for termination was drug abuse. CP 2-3. The disposition order and subsequent review orders required only drug treatment and psychological testing. CP 2. The Department's most recent update to the Individual Safety and Service Plan, submitted on February 12, 2006 for the permanency planning hearing on February 24, 2006, reads as follows:

Ms. Singleton was to remain clean and sober and continue with her chemical dependency treatment and other supportive services as her counselor sees fit. She has done that, and appears to be maintaining her sobriety.

Ex. 1 at 3. Ms. Sampey received no notice of any "ADHD deficiency" as required by due process and the statute. To the contrary, she was told she was doing everything she was supposed to be doing. This Court should reverse the termination order because it is based on a deficiency for which Ms. Sampey received no notice.

d. Even if inexperience with ADHD is a parental deficiency, the trial court impermissibly shifted the burden of proof to the mother to show that she could raise a child with ADHD. The State bears the burden of proving present parental unfitness by clear, cogent and convincing evidence. Santosky, 455 U.S. at 747-48. Although the burden of *production* may be shifted in certain circumstances, the ultimate burden of persuasion always rests with the State. C.B., 134 Wn. App. at 955-56. In this case, the juvenile court improperly shifted both the burden of production and the burden of persuasion to Ms. Sampey to prove she could raise a child with ADHD.

As discussed in subsection (a) above, the termination statute requires the State to prove “that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future.” RCW 13.34.180(1)(e). The same subsection allows for limited burden-shifting as follows:

A parent's failure to substantially improve parental deficiencies within twelve months following entry of the dispositional order shall give rise to a rebuttable presumption that there is little likelihood that conditions will be remedied so that the child can be returned to the parent in the near future. The presumption shall not arise unless the petitioner makes a showing that all necessary services reasonably capable of correcting the parental deficiencies within the foreseeable future have been clearly offered or provided.

RCW 13.34.180(1)(e). The statute does not allow the burden to be shifted to the parent as to deficiencies not identified in the disposition order, and does not allow the burden to be shifted as to deficiencies for which the State did not provide services. Id.

Here, the court properly ruled that a presumption of unfitness arose with respect to Ms. Sampey's drug abuse and minor mental health issues, because those were the identified deficiencies and it took Ms. Sampey longer than 12 months to cure them. (The court also properly found that Ms. Sampey rebutted the presumption and no longer has these problems). But the court improperly ruled that a presumption of unfitness also arose with respect to inexperience with ADHD.

The court erred in three ways with respect to the burden of proof: (1) it ruled that a presumption of unfitness arose even though this "deficiency" was not identified until three years after the entry of the disposition order; (2) it ruled the presumption arose even though the State had provided no services to address this "deficiency"; and (3) it shifted not only the burden of production, but also the ultimate burden of proof to Ms. Sampey to show she could raise a child with ADHD. Any of these errors alone would require reversal. RCW 13.34.180(1)(e); C.B., 134 Wn. App. at 955-56. The combination of the three, especially in light of the notice

problem discussed above, resulted in an extraordinarily unfair termination proceeding.

e. Regardless of who bears the burden, there is insufficient evidence to support termination under subsection (e). *Even if* inexperience with ADHD were a parental deficiency and *even if* a parent's rights could be terminated with no prior notice of the deficiency alleged and *even if* the burden of proof could be shifted to a parent as to a deficiency not identified in the disposition order and for which no services were provided, the termination in this case would still be improper because the record shows Ms. Sampey can handle Colton's ADHD.

During their visits, Ms. Sampey employed the same techniques with Colton that the foster mother had been taught by the State-provided therapist. She used a quiet, soothing voice, and always gave Colton sufficient warning before it was time to go somewhere. RP 100, 290, 293, 327-28. The visitation supervisor observed that Ms. Sampey and her partner are "incredibly patient people, and very, very loving people." RP 290.

Furthermore, Colton's ADHD is now under control. According to Colton's therapist, he and Colton no longer have appointments with each other because the child's medications are working and he is doing well.

RP 102. The foster mother agrees that the medication “has helped tremendously.” RP 165.

The State’s social worker and the prosecutor acknowledged that “there is little risk to Colton should he be returned home.” Ex. 1 at 6; RP 78, 358. Accordingly, termination of Ms. Sampey’s relationship with Colton is unconstitutional and violates RCW 13.34.180(1)(e).

3. Assuming a parent’s inexperience with ADHD constitutes a deficiency, the State’s utter failure to provide Amy Sampey with any of the myriad services it provided the foster mother to help her handle a child with ADHD requires reversal under RCW 13.34.180(1)(d).

Subsection (d) of the statute precludes termination of parental rights unless the State proves, by clear, cogent, and convincing evidence:

That services ordered under RCW 13.34.136 have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided.

RCW 13.34.180(1)(d) (emphasis added). The State must affirmatively offer or provide the services in question. In re Dependency of Hall, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983). Even after the Department has decided its plan is to have the foster parent adopt the child, that “does not relieve the supervising agency of its obligation to provide reasonable

services, under this chapter, intended to effectuate the return of the child to the parent.” RCW 13.34.145(11).

The trial court erred in concluding that the State had satisfied its obligations under subsection (d) by providing the drug-addiction recovery services ordered as part of the dependency disposition. The court ignored the second clause of RCW 13.34.180(1)(d), which requires the State to provide not just court-ordered services, but all services necessary to correct parental deficiencies. See T.L.G., 126 Wn. App. at 200. DSHS is required to provide “*all* reasonably available, potentially efficacious services.” In re Dependency of H.W., 92 Wn. App. 420, 428, 961 P.2d 963 (1998). This encompasses “all reasonable services that are available within the agency, or within the community, or those services which the department has existing contracts to purchase.” RCW 13.34.136(1)(b)(vi).

Insofar as the State claimed Ms. Sampey’s lack of experience with ADHD was a deficiency, it was required to provide services to address it. See RCW 13.34.138(2)(c)(iv). Clearly the services were available, because the State provided them to the foster mother. The Department gave Arlette Porter wraparound services, several in-home helpers, and one-on-one instruction from a therapist who is an expert on ADHD. RP 64, 74-76, 90, 98, 160. It gave nothing to Amy Sampey to help her with Colton’s ADHD. RP 100.

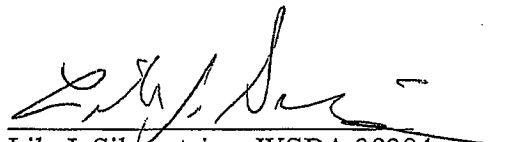
The prosecutor in closing argument acknowledged, “Now I’m not saying Amy can’t learn those skills.” RP 348. But he claimed it was her duty to provide her own services, while the State provided services to the foster mother: “We haven’t heard one lick of testimony about what [Ms. Sampey’s] done to acquaint herself with the proper treatment of a child with ADHD.” RP 351.

Amy Sampey cured the drug abuse problem that prompted intervention. The only barrier to reunification in this case was the State’s allegation of a new deficiency and its failure to provide services to address it. The State may not force the parent to aim at a moving target, while refusing to provide ammunition in the form of services. Because it did not offer Ms. Sampey any services to correct the new “deficiency,” DSHS failed to meet its burden under subsection (d).

E. CONCLUSION

Amy Sampey respectfully requests that this Court reverse the order terminating her parental relationship with her son, Colton Singleton.

DATED this 20th day of April, 2009.


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

FILED

AUG 14 2007

The Court of Appeals

of the

State of Washington

Division III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

RECEIVED

AUG 16 2007

Washington Appellate Project

In re the Dependency of C.S.,

STATE OF WASHINGTON,

Respondent,

v.

AMY SINGLETON,

Appellant.

No. 25502-6-III

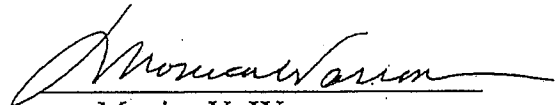
COMMISSIONER'S RULING

Having considered the appellant's motion for accelerated review of the superior court order terminating her parental rights to C. S.; the State's response; and the record, file and oral argument of counsel; and being of the opinion that the question of whether the State has met its burden under RCW 13.34.180(e) of proving by clear, cogent and convincing evidence that there is little likelihood that conditions will be remedied so that the child can be returned to the home in the near future – specifically, whether the appellant is capable of learning how to

handle C. S.'s ADHD, which was diagnosed after C. S. was found dependent and, therefore, was not the subject of services offered the appellant during the dependency – is of sufficient merit to make this case inappropriate for disposition on the motion docket; now, therefore,

IT IS ORDERED, the appellant's motion for accelerated review is denied and the matter is referred to a panel of judges.

August 14, 2007

A handwritten signature in cursive script, appearing to read "Monica V. Wasson", written over a horizontal line.

Monica V. Wasson
Commissioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE C.S., A MINOR CHILD

AMY SINGLETON,

APPELLANT MOTHER.

NO. 81720-1

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:


[X] STEPHEN HASSETT, AAG
SHEILA MALLOY HUBER, AAG
OFFICE OF THE ATTORNEY GENERAL
PO BOX 40124
OLYMPIA, WA 98504-0124

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] AMY SINGLETON
1100 HESSE RD, SPACE 6
REPUBLIC, WA 99166

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF APRIL, 2008.

X  _____

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711